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Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 19_

ALAN CHARLES VENET,

Petitioner

versus

STATE OF OREGON

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE OREGON SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court err in holding that the altitude of the fly-over was immaterial to the determination of the motion to suppress?

2. Did the state court err in denying the defendant the opportunity to present a defense based on rights contained within the penumbra of the Ninth Amendment to the United States Constitution?

3. Did the state court err in holding that the conviction of the defendant did not burden the defendant's rights under the First Amendment to the United States Constitution?

4. Did the state court err in defining the meaning of the definition of "ultimate user" lacking any showing of legislative intent?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF OREGON,

Respondent,

vs.

ALAN CHARLES VENET,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI

TO THE OREGON SUPREME COURT

Petitioner, Alan Charles Venet, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Oregon Supreme Court, which was issued on 15 April 1991.

OPINIONS BELOW

The opinion of the Oregon Court of Appeals, 103 OrApp 363, 797 P2d 1055

(1990), is attached to the petition for writ of certiorari as Appendix A. The dissent to the opinion of the Oregon Court of Appeals is attached as Appendix B. The decision of the Oregon Supreme Court, 311 OR 166 (1991), is attached and referred to as Appendix C.

JURISDICTIONAL STATEMENT

This court has jurisdiction to review the decisions of the Supreme Court of the State of Oregon, in a criminal action, pursuant to 28 USC § 1257(a). Petitioner is claiming rights under the United States Constitution: Ninth Amendment; Fourth Amendment; Fourteenth Amendment; First Amendment.

Petitioner requested, by telephone, from the clerk of the Oregon Supreme Court the effective date of the Supreme Court's denial of review. The clerk informed petitioner that the judgment of the court was effective on 15 April 1991. The clerk then sent petitioner a copy, according to the clerk, of that judgment - attached as appendix C.

Petitioner prepared his petition according to the date on the copy of the judgment supplied by the clerk of the court. Not until 7 July 1991, when the clerk of this court sent petitioner a sample writ and request to conform his writ, did petitioner become aware of the true date of the denial of review: 19 February 1991; 311 OR 166 (1991) advanced cites. This is not the date given by the clerk.

Petitioner is a pro se litigant who must rely on the Oregon Supreme Court to supply him with the correct information. Petitioner has relied, to his detriment and prejudice, upon the date supplied to him by the clerk of the Oregon Supreme Court(Appendix C). Petitioner received no other notice as to the date of decision than appendix C.

Petitioner's review should not be deemed filed out of time as a result of misinformation and/or lack of proper notice. No extension has been requested for this writ of certiorari

because petitioner believed that he was filing his petition in a timely fashion. Petitioner did file his petition within 60 days of the date given to him by the clerk of the Oregon Supreme Court; there is no other reason for the delay.

Petitioner, therefore, for the above stated reasons, requests that this court order that the filing of his petition is timely.

CONSTITUTIONAL PROVISIONS

First Amendment to the United States Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourth Amendment to the United States Constitution:

"The right of the people to be secure in

their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Ninth Amendment to the United States Constitution:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Fourteenth Amendment to the United States Constitution: pertinent part,

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS

ORS475.005(21):

" 'Ultimate user' means a person who lawfully possesses a controlled substance for the use of the person or for the use of a member of the household of the person or for administering to an animal owned by the person or by a member of the household of the person."

ORS475.125(3):

"(3) The following persons need not register and may lawfully possess controlled substances under (ORS475.992).***(c) An ultimate user or a person in possession of any controlled substance pursuant to a lawful order of a practitioner or in lawful possession of a Schedule V substance, unless otherwise prohibited."

ORS475.992:

"(1) Except as authorized by ORS475.005 to 475.285, 475.295 and 475.940 to 475.995, it is unlawful for any person to manufacture or deliver a controlled substance. Any person who violates this subsection with respect to: (a) A controlled substance in Schedule I, is guilty of a Class A felony."

STATEMENT OF THE CASE

This is an appeal (review) from the decision of the Oregon Court of Appeals, entered on 12 September 1990 (App. A); and the decision of the Oregon Supreme Court(affirming without opinion) entered on 15 April 1991 (App. C)

This case began when officer Barbero, of the Josephine County Sheriff's Department, made a fly-over of the petitioner's home and property. The officer thought he had spotted marijuana growing on the petitioner's property.(Ptr, 29) Subsequently, the officer obtained a warrant, based on his observations, to search the petitioner's property. The officers serving the warrant found growing marijuana plants and arrested the petitioner.(Ptr, 29;Tr, 4, 11)

On 5 February 1988, the petitioner filed a motion to controvert and motion to suppress the evidence as illegally obtained (Ptr, 7); and filed for an omnibus motions hearing - held 27

April 1988. The petitioner argued that the altitude of the police fly-over was material to the determination of whether the officer was in plain view when he made his initial observations. (Ptr, 29-38). In the motions, petitioner argued that the officer lied about the altitude and nature of his flight over the petitioner's property. Petitioner argued that the lowness of the flight was a violation of his right to privacy. Petitioner argued that his affidavits in support of the motions clearly showed that the fly-over was a warrantless search.

The state argued that the altitude of the aircraft was immaterial to whether the officer made his observations in plain view. (Ptr, 31). The trial court ruled that "The law in Oregon is (that) the altitude of the aircraft is not the test, and that's what your affidavit is raising. What your series of affidavits are raising." (Ptr, 37). The trial court denied petitioner's motions to controvert and to

suppress the evidence (Ptr, 39).

Petitioner objected to the court's ruling to preserve the issue for appeal (Ptr, 40). The state made no objection to the court's ruling that petitioner's affidavits were taken as admitted by the state - as to the height of the fly-over (Ptr, 40).

Petitioner also raised, at the omnibus hearing, three other issues. The first was a defense based on the right to own and use property, under the Ninth Amendment (Ptr, 19-22). Petitioner argued that the state must make a showing of compelling interest to deprive him of his private property. The state argued that no case law supports petitioner's contentions - of a fundamental right to own and use his property. (Ptr, 20-22). The trial court ruled that the petitioner could not present evidence to support his claimed Ninth Amendment right. (Ptr, 22)

The second defense was petitioner's rights to the sacrament of his church under the

First Amendment, without undue burden by the state's prohibition under its general criminal statute.(Ptr, 22-42). The trial court held an evidentiary hearing on the issue on 5 May 1988. (Tr, 2-82) The state conceded that petitioner's conduct was religious but insisted that his conduct must be regulated. (Tr, 82) The trial court ruled that the First Amendment does not protect the petitioner's conduct. (Tr, 91-100)

The third defense was petitioner's claim that he is an "ultimate user", as defined in ORS475.005(21) & 475.125(3)(c), infra. Petitioner argued that he fell within the provisions of the exemption stated in the statute: that he need not register and may lawfully possess controlled substances, if he is an "ultimate user." (Ptr, 7-13) The respondent argued that no one could be an ultimate user of marijuana in the state of Oregon because it is illegal to possess marijuana. The respondent argued that an

ultimate user was a person with a prescription. (Ptr, 8-13). The trial court ruled that the petitioner would not be allowed to present evidence on the issue. (Ptr, 12).

On appeal, petitioner raised and argued the above issues in his opening brief. (App.Brief, 13-16) The state asserted that the petitioner did not preserve the issue of the altitude of the fly-over, then admitted that the court did consider the issue at the hearing of 27 April 1988 (Resp. Brief, 19) The court of appeals ruled that the petitioner had not raised the issue that the fly-over was an unlawful search without probable cause, and refused to address petitioner's arguments (Appendix A, 2); the claim of a Ninth Amendment right has no arguable merit; the trial court properly rejected the petitioner's First Amendment right; petitioner is not an ultimate user.

A dissent was filed by Judge Newman, in which he stated that the motion to suppress

was improperly denied.(Appendix B, 2) The Supreme Court affirmed the opinion of the appellate court without comment.

QUESTIONS PRESENTED FOR REVIEW

1)Did the court err in holding that the altitude of the fly-over was immaterial to the determination of the motion to suppress?

The question presented is straightforward: is the altitude at which a police fly-over is conducted material to the determination of whether the initial, warrantless observation was made in plain view? Respondent suggests that the issue was not raised and preserved for appeal. Respondent's suggestion is not supported by the facts. Respondent also insists that the altitude of the aircraft is not an issue which can be raised in a determination of whether the initial, warrantless observation was made in plain view.

The state appellate court, on suggestion from the respondent, has decided that the issue was not raised and preserved in the trial court and the court refused to address the issue. (App. A, 2) Petitioner did, however, raise and argue the issue before the trial court. (Ptr,33-36) A dissent to the appellate court's decision was filed by Judge Newman wherein he stated that the petitioner had done enough to preserve the issue for appeal. (App. B, 1-2) The petitioner identified the argument and the state engaged in that argument. (Ptr,33-36) The trial court ruled that the altitude of the aircraft was immaterial to a determination of whether the police observations were made in plain view. (Ptr, The petitioner has properly raised and preserved the issue for review .

Petitioner argues that the altitude of the flyover is material to a determination of whether the officer's initial observations were made in plain view. Petitioner relies on

this court's ruling in Florida v. Riley, 488 US 445, 109 SCt 693, 102 L Ed 2d 835 (1989). In that decision this court stated that if observations were made while the officers airplane was in violation of the F.A.A. regulations, without a prior warrant, such warrantless observations could violate the right to privacy clause of the Fourth Amendment to the United States Constitution.(Id, at 102 L Ed 2d 838.)

All members of this court agreed that the altitude was material, at least, to any determination of the issue.

This case is distinguishable from Riley in that the aircraft involved is a fixed-wing airplane. This court stated that the F.A.A. regulations are specific as to the allowable minimum altitude of a fixed wing airplane over private property: the regulation mandates at least 500' above the surface. Both petitioner and respondent agree that the regulations mandate the 500' minimum height for fixed-wing aircraft.

The trial court took as admitted that the airplane was only 120' from the ground when the observations were made in this case. (Ptr, 36-37: affidavits in trial court file). The only contention between the parties is the materiality of the altitude of the fly-over to a determination of the plain view doctrine.

Petitioner was not allowed to address the rarity of the altitude nor any other issue pertaining to the altitude of the fly-over. Petitioner was denied an opportunity to address the issue. The state's arguments on appeal, after the fact, are not timely raised nor do they reflect the facts in this case.

The only question raised here asks if the altitude of the fly-over is material to a determination of plain view observations under the Fourth Amendment. Petitioner requests a remand, to the state court, to hear the issue.

2)Did the state court err in denying the petitioner the opportunity to present a defense based on rights contained within the penumbra of the Ninth Amendment to the United States Constitution?

The question is does the petitioner have the right to defend himself by raising a right that is reserved to him in the Ninth Amendment? Petitioner argued that he has a fundamental right, under the Ninth Amendment, to possess and utilize his private property; and that the respondent could not deprive him of his property without a substantial showing of a compelling interest. Respondent argued that petitioner had failed to identify case law that establishes his right to own private property as a fundamental right.

The petitioner raised and preserved the issue at the omnibus hearing of 27 April 1988. (Ptr, 19-20). The petitioner raised the issue in

his appellate brief. The appellate court dismissed petitioner's Ninth Amendment rights with but one single sentence in its decision. (App. A, 4)

Petitioner argues that he has been denied an opportunity to defend himself. Petitioner has asserted a fundamental, constitutional right to own and use his private property. This court has recognized that the Ninth Amendment is a repository for the people's rights not specifically enumerated in the the Constitution. (Roe v. Wade, 410 US113 (1973); Griswold v. Connecticut, 381 US479 (1965) Petitioner argues that he must be allowed to present his evidence -- that he has the constitutional rights he claims, under the Ninth Amendment.

Petitioner argues that the Ninth Amendment protects his right to own and use his private property, and that the state must make a showing of compelling interest to deprive him of his property

The appellate decision states that the petitioner's arguments have no merit. (App. A, 4) Yet, petitioner was never allowed to make any arguments for the appellate court to address. The appellate court has completely missed the petitioner's contention: that he was not allowed to present his defense. Petitioner must first be allowed to present his defense before it can be ruled without merit.

The petitioner argues that he has been denied an opportunity to defend himself; and that this denial has violated his right to due process and equal protection of the law, under the provisions of the Fourteenth Amendment to the Constitution. A petitioner in a criminal action must be allowed to offer any legal defense. Before a court can deny that right it must hear the parties supporting arguments. The trial court ignored the issue as the petitioner stated it. Like the state, the courts have wrongly equated the petitioner's claim to his religious right. This issue has not been

addressed by the lower courts.

Petitioner requests that this court recognize that the Ninth Amendment reserves the fundamental right of citizens to own personal property. Petitioner requests that this court remand the matter back to the state court for determination of the petitioner's claimed Ninth Amendment rights.

3)Did the state court err in holding that the conviction of the petitioner did not burden the petitioner's rights under the First Amendment to the United States Constitution?

The question presented is straightforward: does the state's general criminal statute burden the petitioner's religious rights under the First Amendment Petitioner raised a defense that his conduct was religiously based and protected by the First Amendment to the United States Constitution. (Ptr, 43-46;) The trial court allowed petitioner a hearing to produce

evidence that his conduct was religiously motivated. (Ptr, 45) The petitioner produced documents and witnesses which substantiated his religious conduct. (Tr, 2-44) The respondent admitted that the petitioner's conduct was religious in nature. (Tr, 82)

However, the trial court ruled that petitioner had failed to sustain his burden (that his conduct was religious) and found petitioner guilty as charged. (Tr, 91-100)

Petitioner argued the issue in his appellate brief.(App.Brief, 9-12) The state agreed that petitioner's conduct was religiously based, but subject to regulation. (Resp.Brief, 6-14). The appellate court opinion stated "***The (trial) court properly rejected the defense. Petitioner's conviction for manufacturing marijuana does not violate his rights under the First Amendment." (App. A, 4)

The appellate court failed to elaborate as to what theory of law it used to render its decision. It does cite this court's opinion, in

Employment Division v. Smith, 494 US ____, 110 S Ct ____, 108 L Ed 2d 876 (1990), as supporting its decision. The Supreme court affirmed the opinion without comment.

Although Smith, supra, deals with religious conduct and the state's interest in its general criminal statute, its decision was in a civil matter and not in a criminal prosecution; and the rights in Smith were actually entitlements (unemployment benefits).

Petitioner's religious right has been established and conceded by the respondent. (Resp.Brief, 1, 6) The level of inquiry on a fundamental right includes looking to see if the statute is narrowly drawn to attain the important governmental purposes. Rosen v. Port of Portland, 641 F.2d 1243 (1981). The respondent failed to show that the burden on the petitioner's rights was the least drastic means of protecting the governmental interest. Respondent never addressed this issue, nor did

the trial court. Yet, Rosen, supra, states that the court must decide this issue. The Oregon Court of Appeals failed to address this issue as well.

Petitioner attempted to rebut the respondent's claim that the petitioner's property is a dangerous substance. The petitioner asserted that his property caused no harm. (Ptr, 19-22) However, the court ruled that harm was not an issue. (Ptr, 22) Yet, the respondent's claimed interest rests on its claim that the substance is a dangerous drug. The petitioner argued that he must be allowed to present evidence to refute the respondent's claim of danger, which is the basis for the statute. The court cannot let stand a statute that is based on a set of facts or circumstances which petitioner can show have substantially changed or altered.

Without a showing of danger from marijuana, the necessity of the statute would fail. Without the statute the respondent's

interest in burdening the petitioner's religious practice would fail. This issue is viable and must be addressed, especially since petitioner can support his position with reliable, competent and quantitative evidence that marijuana is not dangerous. It is this categorizing of marijuana that makes the petitioner's religious practice illegal. If the petitioner can successfully show that the substance is not a threat, his defense of religious freedom would prevail.

Therefore, petitioner requests that this court remand the issue of harm back to the trial court for determination.

4)Did the state court err in defining the meaning of the definition of "ultimate user" lacking any showing of legislative intent?

The question presented asks if a state court may define the meaning of a statute absent a showing of legislative intent. The petitioner argued that the use of the word

"or", in ORS 475.125(3)(c), supra, excluded an ultimate user from prosecution under ORS 475.992, supra. The state argued that only persons with a prescription can possess a controlled substance, and that no person may be prescribed marijuana in Oregon.

Petitioner argues that the definition of an ultimate user, within the provisions of ORS475 125(3)(c), is vague; in that the Oregon courts have given the construction to the word "or", within the statute, without benefit of legislative intent. (App A, 4-5) Petitioner argues that the legislative intent behind the usage of the word "or", in the context of the definition of an ultimate user, is the normal usage given for the word: either this or that exclusive of each other. Petitioner asserts that the statute is vague as to whether an ultimate user is a person with a prescription or a person with another, separate and exclusive status.

REASONS FOR ALLOWANCE OF WRIT

1)The Oregon courts have ruled in a manner not consistent with this courts statements in Florida v. Riley, supra. The issue of permissible heights of police aerial observations, over our homes and property, is of great concern to the citizens of the United States. The issue of privacy is fundamental to the concept of ordered liberty and this court must address whether governmental observations made in violation of federal law (F.A.A. regulations) are exempt from the provisions of the Fourth Amendment's plain view doctrine.

2)The Oregon courts complete disregard for the rights reserved to the people, under the Ninth Amendment, must be addressed. The court has, with a single sentence, denied the existence of any rights under the Ninth Amendment. The Oregon courts have failed to adhere to this courts recognition of rights reserved to the people under the Ninth

Amendment. The states must be bound to the United States Constitution and this court's decisions on the Ninth Amendment. This court has recognized that the Ninth Amendment contains fundamental rights retained by the people.

3)The issue of whether the First Amendment protects the religious growing of marijuana, as the sacrament of a bona fide church, from the sweep of the state's general criminal statutes, has not been addressed by this court. Nor was the issue properly addressed in the Oregon courts. This is an important issue of public policy and its burden upon the fundamental religious rights of alternative religions. This issue has great importance to the people of the United States.

The courts have not allowed petitioner the right to produce evidence that would make the statute void, as unnecessary and lacking efficacy. The state's interest must be subject to attack by a defendant. Yet, the state courts

refuse to allow any attack on the claimed basis for the law. Petitioner must be allowed to make his defense or fail; he should not be denied his right to challenge the evidence against him.

4) The intent of the legislature should be ascertained in defining the construction and usage of words in a criminal statute. The Oregon courts have failed to give the words in the statute their normal meaning. This court should remand this action to determine the legislative intent for the use of the word "or" in the statutory defense.

CONCLUSION

Petitioner, Alan Charles Venet, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Oregon Supreme Court.

Respectfully submitted,

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APPENDIX A

Opinion of the Oregon Court of Appeals in State v. Venet, 103 Or App 363, 797 P2d 1055 (No. CA 48454, September 12, 1990)

APPENDIX A

September 12, 1990

Docket No. A48454 - submitted on record and briefs June 27, 1989. STATE OF OREGON, Appellee v. ALAN CHARLES VENET, Appellant.

Presiding Judge Richardson delivered the opinion of the court:

Defendant appeals his conviction for manufacturing a controlled substance, marijuana. ORS 475.992(1). He challenges the denial of his motion to suppress evidence and the court's rulings on his affirmative defenses. We affirm.

Officers entered defendant's land and seized 28 growing marijuana plants during the execution of a search warrant. The affidavit supporting the search warrant states, in pertinent part:

> "On 07-21-87, I (affiant) was flying over the Tetherow Road,

> Williams area of Josephine County; I can further indicate that this is an F. A. A. regulation five hundred (500) feet minimum height flight area and that I flew at an altitude of more than five hundred (500) above the ground, to wit: 2,500 feet above sea level and that while so doing I observed with my naked eye what appeared to me to be growing marijuana plants."

Defendant moved to controvert the affidavit in one particular. He contended that the aircraft was below 500 feet when it was above his property and that the affiant lied when he averred that he saw the marijuana from an altitude above the FAA minimum of 500 feet. Defendant attached a number of affidavits to his motion to the effect that each affiant saw the aircraft fly lower than 500 feet. He moved to suppress the evidence on the ground that the statement that the aircraft was flying above 500 feet "to wit: 2500 feet" was an intentional misstatement that voids the warrant. The trial court ruled:

> "The altitude at which the airplane in the instant case flew is irrelevant to the reasonableness of the search, for sake of this motion the court presumes, without having heard testimony on this issue, that the affidavits filed by the Defendant's witnesses are true; the State does not concede this as the State was prepared to offer contradictory testimony."

On appeal, defendant contends that the court erred by denying the motion to controvert the affidavit and, additionally, argues that the fly-over was an unlawful search, because the flight was not a casual, but purposeful search without probable cause or a warrant. In response to the second contention, the state notes that the defendant did not raise the issue below. Because the issue was not raised below, we decline to address it. ORAP 5.45(2); State v. Hitz, 307 Or 183, 766 P2d 373 (1988); Tarwater v. Cupp, 304 Or 639, 748 P2d 125 (1988); Cooper v. Eugene Sch. Dist. No. 4J, 301 Or 358, 723 P2d 298

(1986); appeal dismissed 480 US 942 (1987). The sole basis of his motion to suppress was the controversion of the alleged altitude of the aircraft.

The substance of the defendant's first contention is that, under "Federal case law* * * 'if affiant intentionally makes false statements to mislead a judicial officer on application for a warrant, these falsehoods render the warrant invalid regardless of whether or not such statements are material to establishing probable cause.' " He cites United States v. Hunt, 496 F2d 888, 894 (5th Cir 1974), and United States v. Thomas, 489 F2d 664 (5th Cir 1973), cert den 423 US 844 (1975). ORS 133.693 and the Fourth Amendment do not require that a search be invalidated on account of any and every intentionally false statement in an affidavit. There is a measure of discretion left to the court to determine if the intentionally misstated facts in the affidavit were inserted

to mislead the magistrate to whom the warrant application is made.

Here, the court assumed the truth of the controverting affidavits that defendant submitted and concluded that the altitude of the airplane was not material. In response to defendant's argument that, if the averment was incorrect, it was intentional, the court implicitly found the affidavit not to be intentionally misleading. The court correctly held that whether the aircraft was flying over defendant's property above or below an FAA-mandated minimum altitude is not determinative of whether the fly-over violated the Fourth Amendment. See State v. Davis, 51 Or App 827, 627 P2d 492, rev den 291 Or 368 (1981); see also Florida v. Riley, 488 US 445, 109 S Ct 693, 102 L Ed 2d 835 (1989). The court properly denied the motion to controvert and to suppress the evidence.

Defendant filed a notice of intent to rely on three affirmative defenses. The first

was based on the Ninth Amendment; the second, on the Free Exercise Clause of the First Amendment; and the third, on ORS 475.125(3). The first and third defenses were stricken before trial, and the second was denied after all the evidence was presented by both parties. Three of defendant's assignments of error relate to those rulings.

The defense based on the Ninth Amendment has no arguable merit, and we need not discuss it further.

In the second defense, defendant claims that his use and, inferentially, his growing and possessing marijuana is for a religious purpose and is protected by the First Amendment.[1] He presented evidence that he is an ordained minister of the Universal Industrial Church of the New World Comforter and contends that consumption of marijuana is a sacrament of the church. He presented evidence about the role that marijuana plays in church ceremonies.[2] The court properly

rejected the defense. Defendant's conviction for manufacturing marijuana does not violate his rights under the First Amendment. Employment Division v. Smith, 494 US ___, 110 S Ct ____, 108 L Ed 2d 876 (1990)

The third defense is based on ORS 475.125:

> "(3) The following persons need not register and may lawfully possess controlled substances * * *:
>
> "* * * * *
>
> "(c) An ultimate user or a person in possession of any controlled substance pursuant to a lawful order of a practitioner or in lawful possession of a Schedule V substance, unless otherwise prohibited."

Defendant argues that he is an "ultimate user" and may lawfully possess marijuana. He contends that the term "ultimate user," followed by the conjunctive "or," is not modified by the reference to an order of a practitioner or lawful possession of the substance. We disagree. The definition of ultimate user includes lawful possession

Defendant did not show that he had lawful possession of the marijuana, and the court correctly struck the statutory defense.

Affirmed.

FOOTNOTES

1

Defendant does not contend that his growing, possessing or using marijuana is protected by the state constitution. He was charged only with the manufacture of marijuana. We assume, but do not decide, that the manufacture, possession and use of marijuana can be equated for the purposes of analyzing defendant's First Amendment contentions.

2

Defendant was convicted of manufacturing a controlled substance, marijuana, by growing it on his property. He was not convicted of its possession. He argued that he grew it only for the use by himself and other church members.

APPENDIX B

JUDGE NEWMAN, dissenting:

The majority states that defendant did not raise below the issue of whether the flyover was a purposeful search that violated Article I, section 9. During the omnibus hearing, defendant questioned the lawfulness of the aerial observation and explicitly cited Article I, section 9, as authority. On appeal, defendant claims that the flyover violated Article I, section 9. Both below and here, defendant did enough to raise the issue.

To bolster its refusal to consider defendant's position respecting the flyover, the majority cites State v. Hitz, 307 Or 183, 766 P2d 373 (1988). That case, however, does not support the majority. In Hitz, the court stated:

> "We have previously drawn attention to the distinctions between raising an issue at trial, identifying a source for a claimed position, and making a particular argument. * * * The first ordinarily is essential, the second less so, the third least." 307 Or at 188. (Emphasis in original.)

At the omnibus hearing, defendant raised the issue by challenging the flyover as an unlawful search. Moreover, he identified the source of his position as Article I, section 9. He did not make the particular argument below that he makes here -- that a police aerial observation is a search under Article I, section 9, if it is a purposeful effort to see activities on a person's land. Defendant, however, did enough. Although he did not make the particular argument, his omission is not surprising (and should not be fatal). This court had not yet decided State v. Ainsworth, 95 Or App 240, 770 P2d 58, rev allowed 308 Or 158 (1989). As of this writing the Supreme Court has not decided it either. The majority should

address the merits of defendant's argument.

Turning to the merits, a police aerial observation is a search under Article I, section 9, if it is a purposeful effort to see activities on a person's land. State v. Ainsworth, supra, 95 Or App at 245.

The state argues that defendant failed to show that the affiant's observations were the result of a purposeful effort. Because the initial observation was made without a warrant, however, the state has the burden to show that the information in the warrant was legally obtained. ORS 133.693(4). It failed to show that the aerial observation was not a purposeful effort to see what was on defendant's land. See State v. Nevler, 95 Or App 694, 770 P2d 956 (1989).

The majority errs when it affirms the trial court's denial of the motion to suppress.

I dissent.

APPENDIX C

Opinion of the Oregon Supreme court in

State v. Venet, 311 Or 166 , February 19,1991.

APPENDIX C

February 19, 1991.

The decision of the Court of Appeals is affirmed without opinion. Review denied.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19

STATE OF OREGON,) Supreme Court No.

Respondent,)

ALAN CHARLES VENET,)

Petitioner.)

AFFIDAVIT OF SERVICE

STATE OF OREGON)

County of Josephine) ss

I, Alan Charles Venet, being first duly sworn, depose and say that I am the petitioner in the above entitled case; that to my knowledge three true and exact copies of the conformed petition for writ of certiorari have been placed in a sealed envelope, with first-class postage prepaid, addressed to the respondent's counsel of record, Dave Frohnmayer,

Attorney General, 400 Justice Bldg., Salem, Oregon 97310, and served upon him by depositing the envelope in the United States Post Office on 22 July 1991; that all parties required to be served have been served, pursuant to Supreme Court Rules 28.3 & 28.5(c).

Alan Charles Venet

Alan Charles Venet

SUBSCRIBED AND SWORN to before me this 23 July 1991.

Notary Public of Oregon

My commission expires 1-13-93